

Applications for Sale of the Family Home after One Year of Bankruptcy – A Creditor’s Prerogative?

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Introduction

A vast body of case law has emerged over the last two decades defining the precise scope of equity’s jurisdiction to relieve against undue influence in the specific context of residential mortgage transactions. Most of the cases have involved allegations of undue influence by a wife against her husband seeking to set aside a mortgage or charge over the family home made in favour of a bank or building society.¹ In the landmark case of *Barclays Bank plc v O’Brien*,² the House of Lords clarified the circumstances in which a lender will be put on inquiry as to the circumstances giving rise to a presumption of undue influence and, if it is, the steps it should reasonably take to satisfy itself that the wife’s consent to act as surety was properly obtained. The so-called “*O’Brien* defence”, which was further clarified by the House of Lords in *Royal Bank of Scotland v Etridge (No. 2)*,³ has enabled many wives to resile from the mortgage transaction in circumstances where the lender has failed to rebut the presumption of undue influence by proof that the charge was executed as a result of her free will, usually as a result of her having received independent legal advice.

¹ See generally, M. Pawlowski and J. Brown, *Undue Influence and the Family Home*, (2002), Cavendish Publishing Ltd.

² [1994] 1 AC 180, HL.

³ [2002] 2 AC 773, HL

A mortgagee has, however, a number of remedies available to it designed to enforce payment of the mortgage debt, which may be pursued either concurrently as soon as the mortgagor is in default or successively, until payment is recovered.⁴ Possession of the mortgaged property is, of course, normally sought initially, the lender acting as a secured creditor under the legal charge. But there is nothing to prevent the mortgagee from electing to sue the mortgagor on his personal covenant and obtaining a money judgment, thereby not relying on his security and acting as an unsecured creditor in any future bankruptcy proceedings. Indeed, in *Alliance & Leicester plc v. Slayford*,⁵ the Court of Appeal openly recognised this as an “entirely sensible” practice in many cases. The crux of the Court of Appeal’s reasoning was that the enforcement of a money judgment against the husband (as debtor) would not directly affect his wife, since her equitable interest in the property would either be left untouched or, if he was to be made bankrupt and the trustee in bankruptcy were to seek a sale of the property, she would not be deprived of any defences available to her by virtue of her interest. The point arose in *Zandfarid v. BCCI*,⁶ where the bank sought to obtain possession of the matrimonial home owned by the wife and husband. The wife raised the defence of undue influence and an order for possession was refused. The bank then served statutory demands on the husband and wife and petitioned for bankruptcy, giving up its security under the legal charge.⁷ The wife claimed that the bankruptcy proceedings were an abuse of process because the bank was seeking to circumvent the wife’s equity in the home by obtaining an order for sale by the back door as an unsecured creditor. Jonathan Parker J rejected this argument on the ground that the wife would be in no worse position in facing an application for a sale of the property by a trustee in bankruptcy, under s.30 of the Law of Property Act 1925 (now s.14 of the Trusts of Land and Appointment of Trustees Act 1996), during the first year after the bankruptcy than in facing a similar application by a mortgagee as a secured creditor.

Although the courts in both *Slayford* and *Zandfarid* appear to have assumed that a wife will not be prejudiced in raising her *O’Brien* defence, regardless of the nature of the proceedings brought by the lender, it is evident that, in the majority of cases, this will not prevent the ultimate

⁴ *UCB Bank plc v. Chandler* (1999) 79 P & CR 270.

⁵ [2001] 1 All E.R. (Comm.) 1, CA.

⁶ [1996] 1 WLR 1420.

⁷ An act of bankruptcy will sever any beneficial joint tenancy so that the bankrupt’s share will vest automatically in the trustee in bankruptcy: *Re Dennis (A Bankrupt)* [1996] Ch 80, CA.

possession of the mortgaged property. The *O'Brien* defence, if established, does not give rise to any positive right in the wife beyond that of a mere defence which will prevent the charge being executed against her (as opposed to her husband). In other words, it will operate merely to put her in a position as if she had not executed the charge in the first place, but it will not place her in any better position in regard to a claim for possession based on her husband's insolvency. In particular, where the application for a sale is made after one year from the vesting of the bankrupt's estate in the trustee in bankruptcy, the court is to assume that the creditor's interests prevail over all other considerations in the absence of exceptional circumstances.⁸ Given the practice of most lenders to wait until the expiry of the one year moratorium in order to avail themselves of this statutory assumption, the court will be bound in most cases to order a sale especially as the phrase "exceptional circumstances" in s.335A of the Insolvency Act 1986 has been given a very limited meaning in the case law. Only in extreme cases, it seems, will the wife's voice⁹ prevail over that of the lender. This article, therefore, seeks to examine the court's attitude to applications for a sale of the family home brought after one year of the vesting of the property in the debtor's trustee in bankruptcy. It also considers whether arguments based on the wife's right to respect for her home under Article 8 in Schedule 1 to the Human Rights Act 1998 has altered judicial attitudes in balancing the competing interests of the wife and her bankrupt husband's creditors.

The relevant criteria

The criteria to be applied to applications made by a trustee in bankruptcy for possession and sale of the property under s.14 of the Trusts of Land and Appointment of Trustees Act 1996¹⁰ are

⁸ See, s.355A(3) of the Insolvency Act 1986.

⁹ Although reference is made throughout this article to the bankrupt debtor's wife, the same principles would apply to cases involving the wife's bankruptcy where the lender is seeking an order for sale against her co-owning husband. Needless to say, this would also apply to same-sex marriages.

¹⁰ In some cases, the application will be made under s.33 of the Family Law Act 1996 depending on how the property is owned and occupied. Whichever route is taken, the court may still entertain an application for the sale of a co-owned property held on an express trust for sale notwithstanding the existence of a consent order in earlier divorce proceedings that the sale should be postponed: *Avis v Turner* [2007] EWCA Civ 748. A wife's home rights under s.30 of the Family Law Act 1996 are also subordinate to the court's power to order a sale under s.15(1) of the Trusts of Land and Appointment of Trustees Act 1996: *Fred Perry (Holdings) Ltd v Genis* [2015] 1 P & CR DG5. Different considerations may apply if the wife has commenced divorce proceedings against her husband and is seeking a transfer of her husband's interest in the family home as part of her divorce settlement. Here, the court will

currently set out in s.335A(2) of the Insolvency Act 1986 (inserted by Schedule 3 to the 1996 Act). These reflect the repealed provisions in s.336(3) of the 1986 Act as they formerly applied to trustee in bankruptcy applications under s.30 of the Law of Property Act 1925. Under s.335A(2) (formerly, s.336(4)) of the 1986 Act), whilst the court must have specific regard to the needs and financial resources of the bankrupt's spouse and the needs of any children in determining what order to make under a s.14 application,¹¹ it must also consider the interests of the bankrupt's creditors, the conduct of the bankrupt's spouse, so far as contributing to the bankruptcy, and all the circumstances of the case other than the needs of the bankrupt. As in the former s.336(5), there is also provision in s.335A(3) that, in the absence of exceptional circumstances, on an application a year after the property vests in a trustee in bankruptcy, the interests of the bankrupt's creditors outweigh all other considerations.¹²

Applications made after one year of vesting in trustee in bankruptcy

The assumption in the *Slayford* and *Zandfarid* rulings, mentioned earlier, is that a wife will not be prejudiced by a bank initiating bankruptcy proceedings since she can rely on her *O'Brien* defence (and on the allegations she makes in that context) in any s.14 application brought by the trustee in bankruptcy, in just the same way as she could have relied on those matters in an application brought by the lender as a secured creditor of her husband. In the words of Jonathan Parker J. in *Zanfarid*, the “balancing act which the court is required to undertake will be precisely the same in each case.”¹³ Interestingly, however, in all but one of the bankruptcy

seek to strike a fair balance between the competing claims of the divorced wife and the husband's creditors and a postponed enforcement order may be the only way of achieving justice between the parties if the equity is insufficient to enable the charging order to be enforced immediately while leaving sufficient funds available to provide adequate protection for the wife's accommodation. This approach has been held to be in preference to deciding which claim should have predominance to the exclusion of the other: *Austin-Fell v Austin-Fell* [1990] 2 All ER 455 and *Harman v Glencross* [1986] Fam 81. See also more recently, *Kremen v Agrest* [2013] EWCA Civ 41, (when striking a balance between the interests of a husband's judgment creditor and those of his former wife, the interests of the creditor should be respected save to the extent that it was necessary to override them in order to make an appropriate provision for the wife and any minor children).

¹¹ The court is required to make “such order as it thinks just and reasonable”: see. s.355A(2) of the Insolvency Act 1986.

¹² The statutory presumption is premised on Parliament's intention to provide a breathing space of 12 months to the bankrupt and/or his family to enable them to make alternative financial or living living arrangements.

¹³ [1996] 1 WLR 1420, at 1429.

decisions preceding the Trusts of Land and Appointment of Trustees Act 1996,¹⁴ it was held that the interests of the husband's creditors should prevail over the interests of the wife and any children.¹⁵ Post-1996 cases have continued this trend recognising that only extreme circumstances (such as the wife's serious illness) will provoke the court's sympathy in refusing sale or ordering a substantial postponement. In *Nicholls v. Lan*,¹⁶ for example, notwithstanding that the wife suffered from chronic schizophrenia rendering her circumstances "exceptional" within the meaning of s.335A(3) of the 1986 Act, Mr Paul Morgan QC (sitting as a deputy judge of the High Court) upheld the decision at first instance that the interests of the husband's creditors should prevail given that the wife was the owner of another property (jointly owned with her brother) which could be realised in due course in order to meet her husband's indebtedness and buy out the trustee in bankruptcy's share in the home.

What follows, therefore, is a review of the pre and post-1986 case law demonstrating the inevitable cross-fire between the competing interests of the bankrupt's creditor, on the one hand, and the bankrupt's innocent spouse and family, on the other. The resolution of this "tension" between, what Gray¹⁷ has described as, "the use value and the exchange value" of the trust property has been characterised judicially as "no easy thing",¹⁸ but what emerges, as we shall see, is a model which invariably allows the creditor to obtain an immediate order for the sale of the family home notwithstanding competing considerations based on the family's welfare and protection of the home.

Pre-1996 case law

The case of *Re Holliday*¹⁹ appears to have been the only reported bankruptcy decision prior to the 1996 Act in which a sale was not ordered. In that case, however, the bankruptcy petition had been presented by the husband himself as a tactical move to avoid a transfer of property order in

¹⁴ The exception being *Re Holliday* [1981] Ch 405, CA, where the facts were highly unusual.

¹⁵ See, further, D. Brown, "Insolvency and the Matrimonial Home – Sins of the Fathers: *In Re Citro (A Bankrupt)*", (1992) 55 M.L.R. 284, at 286-88.

¹⁶ [2006] EWHC 1255.

¹⁷ See, Gray and Gray, *Elements of Land Law*, (6th ed, 2009), OUP, at p. 1009.

¹⁸ See, *Re Citro (A Bankrupt)* [1991] Ch 142, at 150, *per* Hoffmann J.

¹⁹ [1981] Ch 405, CA.

favour of his wife at a time when no creditors were pressing for payment and he was in a position (in the next year or so) to discharge his debts. There was also evidence that it would be difficult to obtain another suitable home in the area and that disruption to the children's education was likely to be significant. Not surprisingly, the circumstances were viewed as being exceptional, not least because no real hardship would be caused to creditors by postponing sale for a period of five years to allow the youngest child to attain the age of 17.

Ten years after *Re Holliday*, Nourse LJ had the opportunity to review the earlier case law in *Re Citro*²⁰, stating:²¹

“Where a spouse who has a beneficial interest in the matrimonial home has become bankrupt under debts that cannot be paid without the realisation of that interest the voice of the creditors will usually prevail over the voice of the other spouse and a sale of the property ordered within a short period. The voice of the other spouse will only prevail in exceptional circumstances.”

In that case, his Lordship went on to explain that it was not uncommon for a wife (and children) to face eviction and be unable to buy a comparable home nearby (or elsewhere) and that this would be upsetting for the children's education. This would not, however, be enough to attract the court's sympathy. According to his Lordship²²:

“Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are all the melancholy consequences of debt and improvidence with which every civilised society has been familiar.”

Accordingly, sale of the various houses in *Re Citro* were postponed for no longer than six months.

Interestingly, Nourse LJ commented on the fact that in *Re Holliday*, it was highly unlikely that the postponement of payment of the debts would cause any great hardship to any of the creditors.

²⁰ [1991] Ch 142, CA.

²¹ *Ibid*, 157.

²² *Ibid*, at 157.

That, in his view, was the one “special feature” of the case which distinguished it from the other bankruptcy cases. In his view, without that feature, the circumstances in *Re Holliday* would not have been treated as exceptional.

The decision in *Re Citro* was applied and followed in *Lloyds Bank plc v. Byrne*,²³ where the Court of Appeal, in a case where the application for sale (under s.30 of the Law of Property Act 1925) was made by the bank as chargee²⁴ and not by a trustee in bankruptcy, reiterated that the voice of the bank must prevail over that of the wife in the absence of any exceptional circumstances. In that case, the bank was faced with an ever mounting debt which could only be satisfied by a sale of the matrimonial home, whilst still leaving the wife (and her debtor husband) with enough equity to rehouse themselves. Similarly, in *Barclays Bank plc v. Hendricks*,²⁵ a case also under s.30 of the 1925 Act, the wife failed to show any exceptional circumstances because she was the owner of another house in the same area. The wife asked the court to exercise its discretion to defer a sale until her children reached the age of 18 or finished full-time education. She argued that, if she were forced to vacate her present home, she would have to compel her husband to leave the second house to make way for her, which might bring their present amicable arrangements to an end so that he would cease to make the mortgage repayments on the first house. Moreover, the children did not wish to leave their current home which was nearer to their school and friends. Laddie J. rejected the wife’s arguments, holding that she was in a comparatively favourable position because she had another house which she owned and moving her children would not even involve them changing schools. Although the accommodation would be less attractive than the current home (and more travelling would be involved), these were “comparatively small” matters and not by any means exceptional. The fact that the bank would recover almost 20 per cent of its debt was also considered relevant. His Lordship concluded that the moratorium period should be “as short as possible” in the circumstances and “any period more than a few weeks should be avoided if it is likely to cause significant hardship to the chargee”.²⁶

²³ [1993] 1 FLR 369, CA.

²⁴ Parker L.J. concluded that there was no difference in principle between the case of a trustee in bankruptcy and that of a chargee: *ibid*, at 375. But see now, *Mortgage Corporation v. Shaire* [2001] 4 All ER 364.

²⁵ [1996] 1 FLR 258.

²⁶ *Ibid*, at 264.

Post-1996 case law

Although it has now been recognised that s.15 of the Trusts of Land and Appointment of Trustees Act 1996 has changed the law on the way in which the court will exercise its power to order a sale at the suit of a *chargee* of the interest of one of the owners of the equitable interest of the home, the position regarding cases where one of the co-owners is bankrupt remains unchanged under s.335A of the Insolvency Act 1986.²⁷ Thus, although now the court has greater flexibility (because it is obliged to have regard to a number of different factors) under s.15 of the 1996 Act as to how it exercises its jurisdiction on an application for an order for sale of land subject to a trust of land in cases where a co-owner has charged his interest,²⁸ this is not so in cases involving an application for sale by a trustee in bankruptcy. In the latter case, under s.335A(2) of the 1986 Act, although the court must have specific regard to the needs and financial resources of the bankrupt's spouse and the needs of any children in determining what order to make, it must also consider the interests of the bankrupt's creditors, the conduct of the bankrupt's spouse, so far as contributing to the bankruptcy, and all the circumstances of the case, other than the needs of the bankrupt. As mentioned earlier, however, this balancing exercise is inapplicable where the application is made after one year from the vesting of the bankrupt's estate in the trustee. Here, the court is to assume that the creditor's interests outweigh all such considerations, in the absence of exceptional circumstances.²⁹ In most cases, therefore, where the statutory assumption applies, the court will be bound to order a sale. If, on the other hand, the circumstances are viewed as exceptional, the assumption is dis-applied and the court is obliged to revert to the balancing exercise prescribed by s.335A(2) and reach a decision which is just and reasonable having regard to all the factors therein set out.

²⁷ See, *Mortgage Corporation v. Shaire* [2001] 4 All ER 364, in which Neuberger J emphasised that it was "quite clear that Parliament now considers that a different approach is appropriate in the two cases": *ibid*, at 378.

²⁸ For a full review of the cases on s.15 of the Trusts of Land and Appointment of Trustees Act 1996, see, M. Pawlowski and J. Brown, "Orders for Sale: The Creditor and the Family Home", Parts 1 and 2, (2012) 42 *Family Law*, at 64-68 and 180-184.

²⁹ Section 335A(3) of the Insolvency Act 1986. The bankrupt's home will cease to be comprised in the bankrupt's estate and vest automatically in the bankrupt at the end of three years beginning with the date of the bankruptcy unless the trustee has applied for an order for sale in respect of the home: see, s.261(1) of the Enterprise Act 2002 inserting s.283A(1-3) into the Insolvency Act 1986. The period of three years may be extended by the court: s.283A(6) of the Insolvency Act 1986.

(i) *Wife's medical condition*

Not surprisingly, post-1996 cases have accepted that the wife's serious illness may qualify as an exceptional circumstance. In *Judd v. Brown*,³⁰ for example, the wife was undergoing a course of chemotherapy which was likely to continue for five to six months and she claimed that her chances of recovery would be damaged by stress if the matrimonial home was sold. Harman J, refusing an order for sale, held that the wife's sudden and serious attack of ovarian cancer was an exceptional event and clearly distinguishable from problems such as organising substitute housing and rearranging children's schooling, which were foreseeable and long term conditions. Similarly, in *Re Ravel (A Bankrupt)*,³¹ the wife had suffered for many years from paranoid schizophrenia and, although she was stable and living at home, her doctor advised her that "adverse life events" (for example, a move to a smaller property away from supportive friends and family) could cause a relapse of her condition. Blackburne J held that the wife's circumstances justified a postponement of the order for sale for one year to enable suitable alternative accommodation to be found for her by the local authority. In his view, six months (ordered at first instance) was insufficient time and postponement of the order for five years (as contended by the wife) would be too long for the creditors to wait for their money. The case is authority for the proposition that the wife's illness need not be sudden and short term to merit the exercise of the court's discretion in her favour. Indeed, his Lordship opined that circumstances where a person who suffers from terminal cancer but whose life expectancy cannot be judged and whose illness, therefore, could properly be described as long term and of indeterminate duration, could still be characterised as exceptional, justifying no order or, alternatively, a postponement of sale indefinitely.³²

Again, in *Claughton v. Charalamabous*,³³ the trial judge concluded that the wife's renal failure and chronic osteoarthritis, the latter imposing severe restrictions on her mobility, amounted to

³⁰ [1998] 2 FLR 360.

³¹ [1998] 2 FLR 718.

³² Contrast, *Bank of Ireland Home Mortgages Ltd v. Bell* [2001] 2 All ER (Comm) 920, where the Court of Appeal held that the wife's health could only be taken into account as a relevant consideration to the postponement of an order for sale, not a reason for refusing it.

³³ [1999] 1 FLR 740. See also, *Re Bremner* [1999] 1 FLR 912, where the court recognised that the wife had a need to remain in the property to care for her terminally ill bankrupt husband. In *Re Mott* [1987] CLY 212, Hoffman J postponed sale until after the death of the bankrupt's mother, who was 70 years old, in poor health and who had

exceptional circumstances under s.335A(3) of the 1986 Act. He, therefore, suspended the order for possession indefinitely (in effect, as long as the wife should continue to live in the property), having regard also to the fact that the husband's creditors would receive nothing from the sale of the house of which the proceeds would be consumed in costs. Jonathan Parker J, on appeal, upheld the judge's order, stating that he was entitled to take the view that the wife's health and immobility, with her associated special housing needs and her reduced life expectancy, amounted to exceptional circumstances. His Lordship also held that the terms of the suspension order were essentially a matter for the discretion of the judge and that an appellate court would not normally interfere, unless it was clear that a judge had misdirected himself in law or erred in principle, which had not happened in this case. Ultimately, therefore, the question of what constitutes "exceptional" is largely a value judgment to be left to the trial judge with very little scope for interference at appellate level. In *Hosking v. Michaelides*,³⁴ however, Mr Paul Morgan QC (sitting as a deputy judge) ventured an actual definition of the word "exceptional" to mean "out of the ordinary course, or unusual, or special, or uncommon". Here, the wife's medical condition was such that the loss of the house would be "disastrous" for her and could aggravate her dangerous behaviour both to herself and her children.

An important case which deserves closer attention is *Nicholls v Lam*.³⁵ Applying the meaning of the word "exceptional" in *Hosking*, above, the district judge at first instance concluded that the wife's chronic mental condition rendered the circumstances exceptional so as to dis-apply the statutory assumption and engage the balancing exercise required under s.335A(2). For the purposes of that sub-section, however, the district judge concluded that there was no relevant

lived in the house for 40 years. The evidence of her doctor was that she would deteriorate if she was forced to move from her home. His Lordship characterised the case as one of extreme hardship, especially as the son's creditors were largely the State in the form of the Inland Revenue and the Department of Health and Social Security.

³⁴ [2004] All ER (D) 147, (order for possession postponed for six months). The deputy judge applied the definition of "exceptional" suggested by Lord Bingham CJ in *R v. Kelly* [2000] 1 QB 198, CA, in the entirely different context of s.2 of the Crime (Sentences) Act 1997. The Lord Chief Justice concluded that, to be exceptional, a circumstance "need not be unique, unprecedented or very rare but it cannot be one that is regularly, or routinely, or normally encountered": *ibid*, at 208.

³⁵ [2006] EWHC 1255. More recently, in *Everit v Budhram* [2009] EWHC 1219 (Ch), Henderson J characterised the bankrupt's husband as having special needs which brought the case within the exceptional category. The husband was significantly affected in terms of mobility and suffering from severe ailments including the after-effects of a stroke and diabetes. An order for sale was postponed for a minimum period of one year. The case highlights the point that exceptional circumstances cannot include the needs of the bankrupt himself (whether they be financial, medical or psychological) because consideration of his needs is precluded by s.335A(2)(c).

conduct on the part of the wife and no children to be considered, leaving only the interests of her husband's creditors, her needs and financial resources and all the circumstances of the case (except the needs of the husband) to be evaluated in the process of determining what was a "just and reasonable" order. One special feature of the case, however, was that the wife was also the joint owner of another property that was inhabited by her brother, the other owner. The existence of her joint ownership in this property was potentially significant in two ways. First, it was suggested that she could go and live at this property with her brother. Secondly, there was the possibility that her interest in the property could be realised and with her share of the proceeds of sale she would have sufficient to buy out the trustee's half share in the equity of the matrimonial home. In the light of this, an open offer was made on behalf of the wife to the trustee, which provided for an order for possession and sale of the home to be suspended in certain circumstances and for a charge to be made over the other property in respect of the bankruptcy debt. This offer, however, was rejected by the trustee largely on the basis that the creditors would not be likely to receive anything towards the payment of the debt in the foreseeable future. In any event, the district judge decided he could not make an order reflecting this offer as it would directly bite on the other property jointly owned by the brother, which was not the subject of the proceedings. Ultimately, the judge ordered that the matrimonial home should be put on the market for sale not earlier than 18 months from the date of the order.

On appeal in the High Court, the deputy judge concluded that the district judge's conclusion that he could not make an order on the terms of the wife's open offer was wrong as he, clearly, did have such jurisdiction. The offer contemplated an order for possession (and sale) of the matrimonial home with suspension of the orders until the happening of specified events. It was, therefore, not dealing with property outside the subject of the proceedings. The next question was whether the district judge had exercised his discretion correctly in making the order he did. In this connection, as mentioned earlier, an appellate court will be slow to overturn the balancing exercise carried out in a lower court unless the trial judge erred in law by leaving out of account relevant considerations or taking into account irrelevant matters or was otherwise plainly wrong in his conclusion.³⁶ In the instant case, the district judge could not be faulted, particularly in his

³⁶ See, *Bank of Ireland Home Mortgages Ltd v. Bell* [2001] 2 All ER (Comm) 920, CA. More generally, see, *Assicurazioni Generali SPA v. Arab Insurance Group: Practice Note* [2003] 1 WLR 577, CA.

evaluation of the impact on the wife of her being forced to leave the matrimonial home. He set out in detail the devastating consequences to the wife of a forced sale, which he considered would not normally have outweighed the detriment to the husband's creditors of being kept out of their money. The peculiar feature of the case before him, however, was the fact that there was a real expectation that the wife would be able to realise her share in the other property and then buy out her husband's trustee in bankruptcy. Although the consequence of this would be that her brother would lose his home, the effect on the wife herself would not be as devastating as losing her own home. In the words of the district judge: "the realisation of her interest would be a transient matter [which] would arise and when completed pass". On balance, therefore, the district judge had been right to identify a difference between ordering the wife out of her own home and seeking to promote a solution where she could stay in the property. In the result, the deputy judge concluded that the district judge's order was unimpeachable, given that there was no compelling reason to deny the creditors the realisation of their debt whilst the wife retained a substantial interest in another property. A postponed sale for 18 months (in order to give the wife time to pay off the trustee) was, therefore, a just and reasonable solution for both parties.³⁷

(ii) *Other personal circumstances*

The cases considered so far have dealt with the wife's physical or mental condition as giving rise to exceptional circumstances. More recent case law, however, suggests that the statutory assumption under s.355A(3) may be dis-applied where other significant personal and human circumstances exist which override the creditor's purely commercial interest in seeking a repayment of his debt.³⁸ In *Louise Brittain (the Trustee of the Property of the Bankrupt) v Haghghat*,³⁹ the wife's oldest son, aged 25, was severely disabled with quadriplegic cerebral

³⁷ Gray makes the point that "such decisions make it clear that there is little latitude in the operation of the statutory discretion and that, even in cases of 'exceptional' circumstances, the outcome may be little more than a short moratorium on sale": Gray and Gray, *Elements of Land Law*, (5th ed., 2009), OUP, at p. 1014.

³⁸ A delay, however, of several years, in part caused by the trustee in bankruptcy's failure to apply for an order for sale, which had caused statutory interest to increase and significant costs to be incurred, has been held not to qualify as an exceptional circumstance: see, *Turner v Avis* [2009] 1 FLR 74 and *Foyle v Turner* [2007] BPIR 43. The fact that the proceeds of sale would be sufficient only to pay the trustee's costs has also been held not to amount to exceptional circumstances as it was a common consequence of bankruptcy: *Harrington v Bennett* [2000] BPIR 630. In *Foenander v Allan* [2006] EWHC 2101 (Ch), an order for sale of the bankrupt's property was varied as there were held to be potentially exceptional circumstances since the amount likely to be recovered in the event of sale depended on the outcome of an insurance claim that had been made as a result of severe subsidence at the property.

³⁹ [2009] EWHC 90 (Ch).

palsy requiring continuous care which was provided by her on a daily basis. The deputy judge ordered that the family home be sold, but only after three years so as to allow the family to be rehoused in other accommodation suitable to their needs. In the course of his judgment, the deputy judge stated:⁴⁰

“In the ordinary run of cases, where a bankrupt’s house is a matrimonial home shared with a spouse and children, the loss of the house to pay the bankrupt’s creditors will almost certainly be a misfortune for the family, but will not for that reason by itself mean that the circumstances are exceptional. Typically (if that is the correct way of describing something exceptional) but not necessarily what makes the case exceptional will be some unusual medical condition.”

In the instant case, the needs of the son were clearly such as to make the circumstances of the case exceptional thereby allowing the court to approach the matter by reference to the various other considerations with a view to making an order which was just and reasonable. On the one hand, if a sale was refused, the creditors would be deprived of an expectation of receiving anything from the bankrupt’s estate in the foreseeable future. Set against those interests (in having possession of the property) were the circumstances of the wife and her three children, in particular, her son’s disability. The deputy judge’s decision to defer possession for three years was, therefore, clearly a compromise solution which was “far from ideal” but which, nevertheless, provided the “best possible balance between the competing interests of those concerned”.⁴¹

Each case, of course, falls to be considered on its own merits. In *Barca v Mears (Trustee of the Estate of Romano Barca)*,⁴² an order for possession and sale was resisted on the ground that it would disrupt the education of the bankrupt’s son, who had special educational needs. The son stayed with his father for most days of the week. The father feared that, if he was rendered homeless, the help which he would be able to provide his son would be severely curtailed and that his son’s progress would cease. The deputy judge, however, concluded that the son’s

⁴⁰ *Ibid*, at [18].

⁴¹ *Ibid*, at 83. The decision was upheld on appeal: [2010] EWCA Civ 1521.

⁴² [2005] 2 FLR 1.

problems were not extreme and there was no question of his having to leave his present school since he would be able to live in his mother's home, if necessary throughout the week.

In *Martin-Sklan v White*,⁴³ the application for an order for sale was made in just less than 12 months following the vesting of the house in the trustee in bankruptcy. Accordingly, the trial judge did not apply the statutory assumption strictly but, nevertheless, approached the application for sale on the basis that the interests of the creditors were a “very important consideration” in balancing the competing interests of the parties. In this case, the bankrupt's wife was an alcoholic who periodically left the home to indulge in a period of alcoholism before returning. There were issues regarding the safety of the two children and the emotional impact upon them of their mother's chronic condition. Their wellbeing and welfare were being protected by a combination of their father, their home and a long-established support network of close neighbours and local school. The needs of the children could not, therefore, be characterised as usual or typical consequences of the bankrupt's indebtedness. To that extent, the case was exceptional in so far as it involved “a family scarred by the effect of alcoholism” and where “the house sought to be realised was one which had very particular properties so far as the family was concerned, having regard to its position in a community which was supporting the children against their family difficulties”.⁴⁴ So far as the interests of the creditors was concerned, it was highly unlikely that an appropriate delay in the sale of the property would cause hardship given that there was a sufficient surplus in the value of the property to protect the creditors – indeed, it was evident that they “will do quite well out of leaving their money in the estate of the bankrupt”.⁴⁵ In the result, the order for sale was postponed for seven years until the youngest daughter reached 17.

(iii) *Likelihood of recovery after postponed sale*

⁴³ [2006] EWHC 3313 (Ch).

⁴⁴ *Ibid*, at [22].

⁴⁵ *Ibid*, at [31]. The fact that the creditors are likely to be paid in full after a delay in the sale of the property will not always make the case exceptional, especially if the other circumstances of the case do not point in that direction: *Donohoe v Ingram (Trustee in Bankruptcy of Ian Charles Kirkup)* [2006] EWHC 282 (Ch). Much will depend on the length of postponement of sale and the extent to which the creditors would suffer hardship by being denied their money. The arithmetic may also point to the fact that the creditors will not necessarily be paid in full on an eventual sale of the property.

In *Donohoe v Ingram (Trustee in Bankruptcy of Ian Charles Kirkup)*,⁴⁶ it was argued that the fact that the creditors were likely to be paid in full with statutory interest, even if the order for sale was postponed for a number of years to allow the children to remain in the property until they were older, amounted to exceptional circumstances. This was rejected by the deputy judge on the ground that there were other circumstances which, taken together, pointed the other way. Moreover, in his view, *Re Holliday*, mentioned earlier, which contained this “special feature”, namely, the likelihood of the creditors being paid in full after the postponement of the sale, had to be approached with a “degree of caution”.⁴⁷ Much will depend, of course, on the length of the delay in the debt being repaid and the degree of hardship to the creditors who will not receive their money for some considerable time. In *Re Holliday*, the period was five years whereas the length of delay in *Donohoe* was 11 years. The relevant rate of statutory interest, continuing costs in the interim and the likely fees payable to the Department of Trade and Industry may also militate against a full recovery of the debt from the eventual proceeds of sale of the property. On the arithmetic alone, therefore, the wife’s argument may fail.

The human rights dimension

A separate attack levelled against the deputy judge’s approach in *Nicholls v Lam*⁴⁸ to ordering a sale of the house was that he had given too much weight to the interests of creditors, particularly as there was little evidence as to the actual identity of each of them or the amount of their individual debts. In support of this contention, it was argued that the wife’s right to respect for her home under Article 8 in Schedule 1 to the Human Rights Act 1998 should have been fully considered. On this point, however, the deputy judge had no hesitation in concluding that the test in s.335A was not inconsistent with the qualified nature of the rights protected under Article 8. This was because the whole purpose of s.335A(2) was to identify the need to respect the home, but not as an absolute objective to be guaranteed in every case but as a consideration in a

⁴⁶ [2006] EWHC 282 (Ch).

⁴⁷ *Ibid*, at [1].

⁴⁸ [2006] EWHC 1255.

balancing exercise.⁴⁹ So far as the interests of the debtor's creditors were concerned, it was significant that s.335A merely provided that their interests were to be taken into account without prescribing the weight to be given to those interests. This was, therefore, largely a matter for the judge in exercising his discretion as to what was fair and reasonable. Moreover, in most cases, there was usually little evidence as to the identity of the creditors and their concerns other than the obvious desire to receive their money sooner rather than later. In these circumstances, it was not incumbent on a trustee to do very much by way of positive evidence as to the creditor's interests. So far as the present case was concerned, the district judge had a statement of indebtedness which provided a global sum due to the creditors, the sum for interest and fees and the sum payable to the DTI. The fact that the original debt was not broken down to show who all the creditors were was not vital to his determination of the main issue.

An Article 8 argument was also raised and failed in *Foyle v Turner*.⁵⁰ Here, HH Judge Norris QC recognised that the protection of the rights under Article 8 required a balance to be struck between the needs of the individual and the needs of the community and for any interference with individual rights to be proportionate to the legitimate aim pursued. However, in his view, the checks and balances that had to be carried out under s.335A of the 1986 Act before an order for sale could be made, which included looking at the needs of and resources of a non-bankrupt spouse and considering whether exceptional circumstances dictated that the needs of the creditors should not be put first, were similar to those required under the European Convention on Human Rights 1950.⁵¹ There was, therefore, no need for any separate consideration of Article 8 rights.

The impact of Article 8, however, is not entirely free from doubt. In *Barca v Mears (Trustee of the Estate of Romano Barca)*,⁵² the deputy judge suggested that a possible shift in emphasis in

⁴⁹ See also, *Jackson v. Bell* [2001] EWCA Civ 387, where the deputy High Court judge held that s.335A was compatible with Article 8. The same view was reached by Mr Paul Morgan QC (sitting as a deputy High Court judge) in *Hosking v. Michaelides* [2004] All ER (D) 147. But see, *Barca v. Mears* [2004] All E.R. (D) 153, where the deputy High Court judge considered that there might need to be a shift in emphasis in the interpretation of s.335A to achieve compatibility with Article 8.

⁵⁰ [2007] BPIR 43. See also, *Donohoe v Ingram (Trustee in Bankruptcy of Iain Charles Kirkup)* [2006] EWHC 282 Ch, where the issue of Article 8 rights was largely side-stepped by a finding that, even on a wider interpretation of exceptional circumstances, the trial judge's conclusion that there were no exceptional circumstances was correct.

⁵¹ See generally, *Kay v Lambeth London Borough Council* [2006] 2 AC 465.

⁵² [2005] 2 FLR 1.

the interpretation of s.335A might be necessary to achieve compatibility with a bankrupt's rights under the European Convention on Human Rights. In his view, the provisions of the 1986 Act ought to be regarded as recognising that, in the general run of cases, the creditors' interests would outweigh all other interests, but leaving it open for a court to find that, on a proper consideration of the facts of a particular case, it was one of the exceptional cases in which that proposition was not true. In the words of the deputy judge:⁵³

“ . . . it may be incompatible with Convention rights to follow the approach taken by the majority in *Re Citro*, in drawing a distinction between what is exceptional, in the sense of being unusual, and what Nourse L.J. refers to as the ‘usual melancholy consequences’ of a bankruptcy. This approach leads to the conclusion that, however disastrous the consequences may be to family life, if they are of the usual *kind* then they cannot be relied on under s.335A; they will qualify as ‘exceptional’ only if they are of an unusual kind, for example where a terminal illness is involved. . . . It seems to me that a shift in emphasis in the interpretation of the statute may be necessary to achieve compatibility with the Convention. There is nothing in the wording of s.335A . . . to require an interpretation which excludes from the ambit of ‘exceptional circumstances’ cases in which the consequences of the bankruptcy are of the usual kind, but exceptionally severe.”

Despite these tentative remarks, however, the trend of the case law has been not to require the operation of a different exercise from that adopted in *Re Citro* or the strict wording of s.335A(3). In *Ford v Alexander (Trustee of the Estate of the Appellants)*,⁵⁴ for example, Peter Smith J. expressly held that the requirements in s.335A(2) and the change of emphasis in s.335A(3) did not infringe Article 8 of the Convention. In his view, they already provided an appropriate balance as between the rights of creditors and the respect of privacy and the home of the debtor. In his Lordship's words:⁵⁵

⁵³ *Ibid*, at [40-41].

⁵⁴ [2012] EWHC 266 (Ch).

⁵⁵ *Ibid*, at [49].

“That balance serves the legitimate aim of protecting the rights and freedoms of others. I am, therefore, of the opinion that the requirements of s.335A satisfy the test of being necessary in a democratic society and thus proportionate (see, *McCann v UK* (App no 19009/04) and *Connors v UK* (App no 66746/01). This was the conclusion in the pre *Pinnock* bankruptcy cases and I see no basis for coming to a different conclusion.”

Reference may also be made to *Re Karia*,⁵⁶ where Lightman J. was asked to consider whether a sale of the property would seriously interfere with the bankrupt’s private and family life and, in particular, his relationship with his daughter as he would no longer be able to provide staying access for her at his flat. This claim, however, was held to be exaggerated given that the bankrupt would be able to obtain an alternative one-bedroom flat using his net income. On the human rights point, his Lordship stated:

“The jurisprudence of the European Court of Human Rights makes absolutely plain that there has to be a balancing exercise when there is some interference with the right to private and family life, between the entitlement of the individual to that right, and the interests, rights and freedom of others. For this purpose, the interests of creditors on a bankruptcy are factors which have to be counter-balanced against the interference with the individual’s rights. The balancing exercise is essentially a matter for national legislation. The national legislation in this country in the form of s.335A of the Insolvency Act 1986 effects the balancing exercise.”

The conclusion, therefore, that the requirements as set out in s.355A do not infringe Article 8 rights finds general support in the English case law. The courts continue to apply the same test as applied in the pre-1986 decisions on bankruptcy, so that exceptional or special circumstances must, in the words of Nourse LJ in *Re Citro*,⁵⁷ fall outside the “normal melancholy consequences of debt and improvidence”.⁵⁸

⁵⁶ [2001] WL 1560733.

⁵⁷ [1991] Ch 142, at 157.

⁵⁸ See, for example, *Harrington v Bennett* [2000] BPIR 630; *Dean v Stout (The Trustee in Bankruptcy of Mushtaq Hussain Dean)* [2004] EWHC 3315 (Ch); *Everitt v Budhram* [2009] EWHC 1219 (Ch) and *Fred Perry (Holdings) Ltd v Genis* [2015] 1 P & CR DG5.

Conclusion

It remains to be seen whether lending institutions continue to adopt the practice of suing the husband debtor upon his personal covenant with a view to forcing a sale of the matrimonial home by his trustee in bankruptcy, notwithstanding the wife's equity arising from a successful *O'Brien* defence.⁵⁹ The practice has been alluded to by the writers⁶⁰ in the slightly different context of an application for sale at the suit of a lender (as chargee) as opposed to the debtor's trustee in bankruptcy. Here, the range of factors the court is obliged to consider, under s.15 of the 1996 Act, is wider than under s.335A(2) of the 1986 Act. But here too, the trend of the recent authorities is to afford the interest of the creditor priority over the occupying spouse even in circumstances where the effect of the order is to cause considerable hardship to the wife and her resident family.⁶¹

Interestingly, as we have seen, in at least two notable cases,⁶² both the High Court and Court of Appeal appear to have assumed that a wife will not be prejudiced in raising her *O'Brien* defence, regardless of the nature of the proceedings brought by the lender. It is submitted, however, that in most cases, the *O'Brien* defence will not prevent the ultimate repossession of the mortgaged home. Apart from the tactic of not relying on its security and bringing bankruptcy proceedings against the husband (relying instead on the personal covenant as an unsecured creditor), the lender has the alternative choice of pursuing the husband as secured creditor against *his* interest in the house which is unaffected by any undue influence argument raised by the wife in respect of her own share in the property. In this latter case, as mentioned earlier, it is also open to the

⁵⁹ In the first quarter of 2015 (January to March), there were a total of 20,826 individual insolvencies in England and Wales, comprising 4,209 bankruptcies, 6,213 debt relief orders (DROs) and 10,405 individual voluntary arrangements. In total, individual insolvencies have generally been on a decreasing trend since 2010. In particular, the total number of bankruptcy orders in the 1st quarter of 2015 was 6.6% lower than in the 4th quarter in 2014 and 22.5% lower than in the same period in 2014. The number of bankruptcy orders has been on a decreasing trend since 2009, but this may have been affected by the introduction of DROs in 2009. There were 1,062 creditor petition bankruptcies in the 1st quarter of 2015, which was 2.3% higher than the last quarter in 2014, but 15.75% lower than the same quarter in 2014: see generally, the *Insolvency Service Statistics – January to March 2015 (Q1 2015)*, pp. 12-16, at <https://www.gov.uk/government/collections/insolvency-service-official-statistics>.

⁶⁰ See, M. Pawlowski and J. Brown, "Orders for Sale: The Creditor and the Family Home", Parts 1 and 2, (2012) 42 *Family Law*, at 64-68 and 180-184.

⁶¹ See, for example, *First National Bank plc v. Achampong* [2003] EWCA Civ 487.

⁶² *Zandfarid v. BCCI* [1996] 1 WLR 1420 and *Alliance & Leicester plc v. Slayford* [2001] 1 All ER (Comm) 1, CA.

lender to enforce the charge against the husband's share and itself apply to the court for an order for sale under s.14 of the 1996 Act. Whichever route is adopted, however, it seems the court will favour a sale of the property with only a relatively short moratorium unless the wife can point to very unusual circumstances rendering an order for possession entirely inappropriate. In cases of bankruptcy, in particular, such circumstances tend to be confined to her medical or mental condition and reflect the same test, despite the introduction of the human rights dimension, as applied by the pre-1986 decisions on bankruptcy. Although other personal circumstances may, as we have seen, be taken into account, the overall impression is that these are again confined to cases involving an unusual medical condition (quadriplegic cerebral palsy) or disability (alcoholism) suffered by a close relative or dependent. Even a sufficient surplus of equity in the house, enough to meet the predicted debt with interest after a postponed sale, may not be enough to bring the case within the exceptional category. The overall conclusion, therefore, is that the court's discretion to refuse (or postpone) sale is very limited in all these cases and the lender will normally be able to achieve by the back door what it would not have been able to do by the front door, namely, force the wife to leave her home so as realise its security. Only in extreme cases, it seems, will the wife's voice prevail over that of the bank and the human rights dimension has done little, if anything, to alter that position.

One rationale for favouring the commercial interests of the creditor is that the trustee in bankruptcy is statutorily bound, under s.305(2) of the 1986 Act, to realise the assets of the bankrupt leaving him with little choice but to proceed with an application for an order for sale of the family home. Coupled with this is the judicial notion, reflected in much of the English case law, that commercial agreements should be honoured and respected. A good example of this kind of reasoning is to be found in the judgment of Walton J in *Re Bailey (A Bankrupt)*,⁶³ where he observed that:⁶⁴

“A person must discharge his liabilities before there is any room for being generous. One's debts must be paid, and paid promptly. . . [The outcome] may be yet another case

⁶³ [1977] 1 WLR 278. In this case, the court was not mindful to postpone sale merely to facilitate a child's studies at a local school for his “A” level examinations. Gray also makes the point that many commercial creditors are themselves spouses or partners (with children) and with mortgage responsibilities of their own affecting their homes: see, Gray and Gray, *Elements of Land Law*, (5th ed., 2009), OUP, at p. 1013, ft. 7.

⁶⁴ *Ibid*, at 283-4.

where the sins of the father have to be visited on the children, but that is the way in which the world is constructed, and one must be just before one is generous.”

What emerges, therefore, from this analysis is a model premised on the principle that the interests of creditors will invariably prevail over family concerns unless there are compelling reasons for refusing (or deferring) sale which are absent from the ordinary run of cases. The model adopted is one which advocates the notion that “money talks” so as to deprive the family of its home because the borrower must honour his debts above all else. Despite, therefore, the initial adoption of a seemingly neutral stance (contained s.335A(2) of the 1986 Act) of requiring the court to engage in a balancing exercise of the competing interests of creditors against the welfare of the family and the needs of the bankrupt’s spouse in determining what order to make within the first year of bankruptcy, that neutrality is then abandoned by a statutory presumption in favour of creditors (contained in s.353A(3)) after one year of bankruptcy which places the onus squarely on the family to persuade the court that “money should *not* talk” and that personal and family welfare should prevail over a sale of the property. In this commercial model, therefore, the protection of the home as a legal concept is inevitably subordinated to purely financial interests once an arbitrary “breathing space” of 12 months has passed which is intended to enable the bankrupt and/or his family to make alternative financial or living arrangements.

An alternative model, premised on the notion of protecting the rights of persons in the family home has, however, found favour in other common law jurisdictions. In New Zealand, for example, the Joint Family Homes Act 1964⁶⁵ allows a couple to register their home as a “joint family home” with the consequence that their beneficial interests will be unaffected by bankruptcy for the benefit of creditors. The creditors of either spouse may only oppose the initial registration or challenge the joint family home registration on the limited grounds set out in the Act. Moreover, although the court has a discretion to cancel any registration in favour of a

⁶⁵ Although the New Zealand Law Commission recommended in 2001 that the 1964 Act should be repealed, this was largely because it discriminated against single owners and couples in de facto relationships and civil unions: see, New Zealand Law Commission, “The Future of the Joint Family Homes Act 1964”, (Report 77, December 2001). Another reason given for repeal was that the number of people registering joint family homes under the Act had dropped considerably by 2001 due to a general fall in the marriage rate. Moreover, the Act’s purpose in protecting the family home when the husband or wife went bankrupt is now covered under the New Zealand’s Relationship Act 1976. A bill to repeal the Act received cross-party agreement in the New Zealand Parliament in 2012.

sale, this cannot be done solely on the ground that one of the spouses has become bankrupt. Cancellation (followed by sale) can only be ordered in exceptional circumstances where, for example, there has been some form of fraudulent dealing, or where both spouses have become bankrupt and there is enough equity in the home from which the creditors can be satisfied without undue hardship to the family. Interestingly, similar schemes providing considerable immunity from the effects of bankruptcy can be found in Canadian provincial legislation.⁶⁶

The priority given to the preservation of the family home in the 1964 Act is radically different from the underlying premise of the English legislation. In *Fairmaid v Otago District Land Registrar*,⁶⁷ North J described the 1964 Act as ensuring that “husband and wife can live contentedly in their home in the knowledge that it is secured to them as a family home so long as they need it whatever the vicissitudes of life may bring.” This sentiment is, of course, entirely at odds with current judicial thinking in our own country. The recent English case law, notably, *Nicholls v Lam*, *Foyle v Turner* and *Ford v Alexander*, involving claims based on the right to respect for the home under Article 8 of the Human Rights Act 1998 did offer an opportunity for our own courts to better protect the personal and human interests of innocent spouses and their children, but that opportunity was, as we have seen, entirely missed both at first instance and appellate level. As Gray has observed:⁶⁸

“The New Zealand legislation was enacted with the express object of promoting the stability and permanence of family life as a higher social end than that represented by commercial security for the creditor. The 1964 Act indeed embodies an imaginative attempt to strike a humane social balance between competing interests and it is arguable that English law would be enriched by the enactment of similar legislation.”

As things stand at the moment, such novel legislation is, of course, unlikely in our own jurisdiction. There is also little hope that the English case law will provide any scope for

⁶⁶ See, Gray and Gray, *Elements of Land*, (5th ed., 2009), OUP, at p. 1017, ft. 11, citing B. Ziff, *Principles of Property Law*, (4th ed., 2006), Carswell Ontario, at pp. 172-173.

⁶⁷ [1952] NZLR 782, at 786.

⁶⁸ See, Gray and Gray, *Elements of Land Law*, (5th ed, 2009), OUP, at p. 1017.

development of Article 8 Convention rights in the balancing of commercial and family interests in the context of a bankruptcy under the 1986 Act.